

As an attorney here in San Francisco, I have been involved with several attempts to stop abusive telemarketers and junk faxers. The hard reality is that the current law is willfully and routinely infringed without regard for the consequences, because the consequences are too limited. Most people cannot afford to file suit for \$500-\$1500 maximum damages. Experience shows that very few if any abusive telemarketers respect "do not call" requests. Despite the good intentions of the law, consumers do not have practical recourse. The abusive telemarketers, which my experience shows are dominated by a relatively few bad actors, act with impunity because they know their downside is limited. They treat TCPA claims as a cost of doing business, and count on the lax rules as providing them a variety of outs which they use to dissuade the few consumers who can take the time to act from pursuing their remedy.

If I were to rank the abuses in order of magnitude, the two major areas are junk faxes and prerecorded solicitations. Starting with junk faxes, I have a pile of approximately 100, with new ones coming daily and no way to stop them short of suit. I fully intend to bring actions on these, but locating the defendants and bringing them to court will take time, and the bottom line fact is that the statutory damages, even including damages and attorneys fees that can be obtained under state law in certain circumstances, combined with the rarity of payment to be expected even on a judgment, make it uneconomical to take action. If I as an attorney cannot find the time to address this daily assault on my fax machine, imagine how your average small business owner or individual feels under the daily assault. I don't need to repeat the costs imposed; on my fax machine, ink alone is about \$0.08 per page, the tied up line gives legitimate clients a busy signal, and the result of draining paper and ink means the machine is unable to receive legitimate faxes when they come in. Multiply this by millions for all of the persons assaulted. The only real remedy currently is to shut off the fax from receiving except when clients tell me a fax is coming, which is of course not practical.

Second are the prerecorded telephone messages. These are the prerecorded "blast" messages that typically attempt to sound like a friendly real person calling, but in reality are identically sent to hundreds of thousands often for very low fees by the telemarketers, whose cost is negligible given current enforceability of the TCPA. These messages tie up phone lines, clutter message inboxes and annoy and harass with no real legitimate purpose, as there is in fact no live person on the line to get information from in the unlikely event the consumer wants it. Prerecorded messages with a commercial purpose should simply be banned as an improper mechanism of advertising. Short of that, the exemptions need to be modified.

Three rule amendments could help ensure the law is respected as Congress intended with respect to junk faxes:

- 1) Clarify that single communications with multiple violations are subject to statutory damages for each violation, and adopt a construction that urges maximum damages of \$1,500 every time there is evidence of willfulness on each violation. Thus, when a junk

faxer not only sends the illegal fax, but fails to include identification in the header, fails to include real contact information, etc. make it undisputably clear that each of those independent and additional violations are subject to their own damages claims.

2. Eliminate or modify the much-abused exemptions. Companies leave messages stating the consumer has "won" something or other, then claim the message is not commercial and not subject to the TCPA. Others claim they are a "nonprofit," then make blatantly commercial pitches. Yet others cull customer purchase histories for telephone numbers that were gathered at point of sale for the purported purpose of identification, with no intimation that the numbers would be used for marketing purposes, and then claim "established business relationship" as a result of an over-the-counter retail transaction where no person would expect to have subjected themselves to marketing calls. A strict rule prohibiting prerecorded messages absent express written consent by anyone with a commercial interest with the caller would more closely effect Congress' intent. (For pre-recorded messages especially, I suggest eliminating the "established business relationship" exemption - Congress did not provide for it, and it has no real legitimate purpose. The fact is, good companies will not call their customers with a prerecorded message - that is how to lose customers. Legitimate marketers' needs to contact their customers in no way require or justify the use of prerecorded messages.)

3. Most important, the rules must provide a mechanism for award of attorneys fees to prevailing consumers as a matter of right. That is the only way this law will be enforced. The junk faxers and prerecorded messagers act with impunity and contempt for the law because they know very few can afford to enforce it.

The current rules have helped to make a sham of the TCPA. They need to be changed to have real teeth. Prerecorded messages and junk faxes should as far as possible be eliminated, and consumers' remedy should be made real by including mandatory attorneys fees for prevailing plaintiffs.

Sincerely,

Jeff Furchtenicht